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No. 105, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendent.

COLORADO'S BRIEF IN OPPOSITION TO MOTION FOR ALTERNATIVE RELIEF.

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INTRODUCTION

On December 16, 1986, Kansas filed a motion for leave to file a complaint against Colorado, together with a complaint alleging material depletion of the waters of the Arkansas River in Colorado in violation of the Arkansas River Compact, primarily by post-compact well development in Colorado. On February 14, 1986, Colorado filed its brief in opposition to the Kansas motion in which Colorado submitted that Kansas had not made a reasonable effort to resolve its concerns through the Arkansas River Compact Administration ("Administration") and that, absent such an effort, this Court should decline to grant the motion. Colorado pointed out that, contrary to the suggestion by Kansas, there is substantial disagreement as to whether post-compact well development in Colorado has materially depleted the flow of the Arkansas River in violation of the Compact. Colorado asserted that the Court should deny the motion for leave to file a complaint because

1. There is a pending investigation by the Administration of post-compact development in Colorado and Kansas;
2. The Administration is not deadlocked or unable to act, but had been proceeding in a cooperative manner to conduct the investigation, notwithstanding differences of opinion as to how the investigation should be conducted;
3. The investigation of well development in Colorado involves complex issues of fact;
4. Passing over the Administration would deny the Court the special expertise of the Administration in addressing the complex hydrologic facts concerning ground water use and would burden the Court with a dispute that might be resolved or narrowed by the Administration; and
5. There is little likelihood of injury while the investigation continues.

On March 3, 1986, Kansas filed a second motion which is captioned: "Motion for Leave to File Complaint or Alternatively to Compel Compliance with Administrative Investigation Pursuant to Article VIII(H) of the Arkansas River Compact." The March 3, 1986 motion makes no reference to the December 16, 1985 motion. Instead, it merely repeats, in somewhat altered form, the allegations in the complaint submitted with the December 16, 1985 motion. The only difference is that, in its second motion, Kansas prays for alternative relief as follows: (1) that the Court compel Colorado to comply with Article VIII.H. of the Compact and the Administration's March 28, 1985 resolution by ordering Colorado to investigate promptly the allegations made by Kansas; (2) that the Court enjoin all post-compact well uses in the Arkansas River Valley pending completion of the Administration's investigation by a date certain; and (3) that the Court retain jurisdiction pending the completion of the investigation by the Administration.

Since Colorado has previously filed a brief in opposition to the Kansas motion for leave to file a complaint, we will confine this brief to the motion for alternative relief.

ARGUMENT

A. Kansas Is Not Entitled To An Order Compelling An Investigation Under The Arkansas River Compact As Requested In Its March 3, 1986 Motion.

1. The Request For An Order Compelling Colorado To Investigate Is Addressed To The Wrong Party And Is Based On A Misunderstanding Of This Court's Role In Resolving Disputes Between Colorado And Kansas Under The Compact.

In its March 3, 1986 motion, Kansas first asks the Court to compel Colorado to comply with Article VIII.H. of the Compact and the Administration's March 28, 1985 resolution by ordering *Colorado* to investigate all of the allegations made by Kansas in the manner dictated by Kansas. Motion at 8. The motion overlooks the fact that the Compact created an Administration comprised of three representatives from each state. Art. VIII.C. An order compelling an investigation under Article VIII.H. would have to be directed to the individual Colorado representatives, who are not named as parties in this action and have not been served. That problem aside, however, there are other reasons why such an order should be denied.

The Arkansas River Compact was approved by Congress in 1949. Act of May 31, 1949, 63 Stat. 145. Major purposes of the Compact were to settle existing disputes, which had been the subject of litigation for nearly fifty years, and to eliminate future controversy. Art. I.

To implement the Compact's purpose of removing causes of future controversy, the Compact directs the Administration to investigate promptly alleged violations of the Compact. Art. VIII.H. The purpose of such investigations is to provide a mechanism for settling controversies by negotiation and agreement, as this Court has urged on many occasions. For example, in *Colorado v. Kansas,* 320 U.S. 383, 392 (1943), the Court stated:

> The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. ... We say of this case, as the court has said of interstate differences of a like nature, that such mutual accomodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power. (Footnotes omitted.)

Although Colorado and Kansas, in ratifying the Compact, did not intend to bargain away their right to bring an original action in this Court for alleged violations of the Compact,[1] it was hoped that investigations by the Administration would eliminate the need for such actions. However, this Court was never intended to function as an administrative appeals board to review decisions by the Administration. That was precisely the conclusion this Court reached in *Texas v. New Mexico,* 462 U.S. 554 (1983). In that case, the Court carefully examined the Pecos River Compact to determine the role that compact left to the Court in resolving disputes between the two compacting

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[1]This is clear from the structure of the Compact and the record of the Colorado-Kansas Arkansas River Compact Commission. The Compact provides: "Findings of fact made by the Administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of the facts found." Art. VIII.I. Although the Compact provides for the possibility of referring disputed matters to arbitration, there was considerable discussion during the negotiations of the Compact that both states would ultimately retain the right to bring an original action in this Court for alleged violations of the Compact if they disagreed with the Administration's findings. *E.g.,* Record of the Twelfth Meeting of the Colorado-Kansas Arkansas River Compact Commission, 12-52 to 12-53 (Feb. 3, 4, 5 and 6, 1948); Record of the Fifteenth Meeting, 15-48 to 15-50 (Sept. 13, 14, 15, and 16, 1948).

states. New Mexico argued that this Court could do nothing more than review official actions of the Pecos River Compact Commission and that the case should be dismissed if the Court found that there were no action of the commission to review or that actions taken were not arbitrary or capricious. *Id.* at 566-67.

In rejecting New Mexico's argument, this Court first noted that the mere existence of a compact does not foreclose the possibility that the Court will be required to resolve a dispute between the compacting states. 462 U.S. at 568. Further, the Court held that, in the absence of an explicit provision or other clear indication, it would not construe a compact to preclude a state from seeking judicial relief when the compact does not provide an equivalent method of vindicating a state's right. *Id.* at 569-70. The Court then emphatically rejected New Mexico's theory that the role of this Court was to review decisions of the commission:

> In recent years, we have consistently interpreted 28 U.S.C. §1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction. (Citations omitted.) We exercise that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system. (Citation omitted.) *If authorized representatives of the compacting states have reached an agreement within the scope of their congressionally ratified powers, recourse to this Court when one state has second thoughts is hardly "necessary for the state's protection." Massachusetts v. Missouri,* 308 U.S. 1, 18 (1939).[18] Absent extra-ordinary cause, we shall not review the Pecos River Commission's actions without a more precise mandate from Congress than either the compact or 28 U.S.C. §1251 provides. (Emphasis added.)

462 U.S. at 570-71. In footnote 18 of the opinion, the Court stated:

> When it is able to act, the Commission is a completely adequate means for vindicating either State's interests. The need for burdensome original jurisdiction litigation, which prevents this Court from attending to its appellate docket, would seem slight.

Id. at 571 n. 18.

The request by Kansas for an order compelling Colorado to investigate allegations made by Kansas under the provisions of Article VIII.H. of the Arkansas River Compact is based on a fundamental misunderstanding of the role of this Court under the Compact. In Colorado's view, the relevant issue is whether the Administration is able to act. If the Administration has agreed to proceed with an investigation, notwithstanding disagreements between the members as to how the investigation should be conducted, the Court should decline to grant the Kansas motion for leave to file a complaint or the alternative relief requested by Kansas. Merely because the Kansas Attorney General apparently had misgivings because the authorized representatives of the states agreed to continue with the investigation on the basis of a cooperative approach is not sufficient, in Colorado's judgment, to justify an original forum in this Court or any other form of relief.

According to Kansas, however, an order compelling Colorado to investigate the Kansas allegations is necessary because "Colorado refused to proceed to investigate depletions by wells and five other areas in the Resolution of October 8, 1985." Kansas Reply Brief/Brief in Support at 15. This is simply not correct. Kansas mischaracterizes the report by the director of the Colorado Water Conservation Board and the Administration's October 8, 1985 resolution. *See* Colorado's Brief in Opposition to Motion for Leave to File Complaint at 11-14. According to Kansas, "[t]hat resolution was *not* a bilateral

affirmation that the investigation should proceed, but rather a unilateral rejection of the investigation in essentially all of the areas deemed crucial by the State of Kansas." Kansas Reply Brief/Brief in Support at 15. We have read the October 8, 1985 resolution many times, but have not yet been able to read the resolution as Kansas does. In fact, the authorized representatives of the compacting states, acting within the scope of their congressionally ratified powers, reached agreement on how to proceed with an investigation of alleged violations of the Compact, notwithstanding differences of opinion as to how the investigation should be conducted. Subsequently, the Kansas Attorney General, for whatever reasons, had "second thoughts" about the cooperative approach to the investigation which the Administration adopted at its meeting on October 8, 1985, and has tried hard to characterize that resolution as something other than a directive to the committee to continue with its investigation. While Colorado believes the Court should be sensitive to charges that one state or the other is using an investigation for the purposes of delay, Colorado does not see how the facts in this case are susceptible to that interpretation.[2]

2. There Is No Basis For An Order Compelling An Investigation Because The Colorado Representatives Have Not Thwarted A Meaningful Investigation By The Administration.

As grounds for its motion to compel, Kansas maintains that the Colorado representatives have thwarted "any meaningful investigation by the Arkansas River [Compact] Administra-

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[2]As the United States Representative to the Administration pointed out in his remarks, the Administration has been successful both in the past and during the current investigation in establishing factual matters. *See* Remarks of the U.S. Representative to the Arkansas River Compact Administration at the annual meeting of the Administration held in Pueblo, Colorado (Dec. 10, 1985) (printed in Appendix A to Colorado's Brief in Opposition to Motion for Leave to File Complaint), Appendix A at 3a.

tion" of (1) post-compact well development in Colorado; (2) the operation of the Trinidad Reservoir; (3) Colorado's failure to abide by a July 24, 1951 resolution of the Administration; and (4) future plans to consume "transmountain" return flows. Each issue requires a separate response. Kansas Reply Brief/ Brief in Support at 8-9, 15.

a) Post-Compact Well Development In Colorado.

With regard to post-compact well development in Colorado, the Administration agreed in its October 8, 1985 resolution to continue with the investigation in the manner recommended by the director of the Colorado Water Conservation Board, which was to determine (1) whether there had been any unexplained declines in streamflow or changes in the relationship between streamflows at key locations in the Arkansas River Basin; and (2) if so, to investigate first the most likely causes for such declines or changes based on the timing and reach of the river in which such declines or changes had occurred.

Kansas asserts that Colorado is thereby simply "attempt[ing] to bury a problem that has plagued the state for decades." *Id.* Kansas alleges that Colorado "[f]or decades allowed the proliferation of unregulated wells in the Arkansas Valley, ignoring the inevitable effects on surface users." *Id.* at 4. And "Colorado refused to address the problem, fearing that agricultural interests would be hurt by any curtailment or regulation of wells." *Id.*

Colorado does not deny that it has struggled long and hard to achieve integrated administration of surface and ground water in the Arkansas River Valley and throughout the State of Colorado. *See, e.g., Fellhauer v. People,* 167 Colo. 320, 447 P.2d 986 (1968); *Kuiper v. Well Owners Conservation Ass'n.,* 176 Colo. 119, 490 P.2d 268 (1971) (upholding State Engineer's

rules and regulations on ground water use in the South Platte River Valley); *Kuiper v. Atchison, Topeka & Santa Fe Ry.,* 195 Colo. 557, 581 P.2d 283 (1978) (upholding water judge's decision to disapprove proposed amendment to rules and regulations on ground water use in the Arkansas River Valley and continuing in force existing rules and regulations); *Alamosa-La Jara Water Users Protection Ass'n. v. Gould,* 674 P.2d 914 (Colo. 1983) (remanding proposed rules and regulations for ground water use in the San Luis Valley for consideration by the State Engineer of additional factors, including environmental and economic concerns). What Colorado objects to in the Kansas statement of facts concerning ground water regulation in Colorado is the failure to acknowledge that Colorado was years ahead of Kansas in regulating well development.

Unregulated well development in Kansas continued until 1977 when the Kansas Chief Engineer declared a moratorium along the Arkansas River Valley in Hamilton and Kearny Counties, the two counties in southwestern Kansas closest to the Colorado-Kansas stateline.[3] By 1980, according to the U.S. Geological Survey, approximately 351,000 acres of land were irrigated by ground water or by surface water from the Arkansas River in Kansas from approximately 3,060 wells.[4] This compares to 56,000 acres that were under irrigation in Kansas in 1939. *Colorado v. Kansas*, 320 U.S. 383, 399 (1943). By contrast, the Colorado Water Judge found that wells in Colorado were used as a supplemental source of supply to irrigate existing

[3] R. Barker, L. Dunlap, & C. Sauer, Analysis and Computer Simulation of Stream-Aquifer Hydrology, Arkansas River Valley, Southwestern Kansas, U.S.G.S. Water-Supply Paper 2200 at 1, 3 (1983).

[4] *Id.* at 8, 15 (160 wells; 31,000 acres irrigated in Phase I study area); L. Dunlap, R. Lindgren & C. Sauer, Geohydrology and Model Analysis of Stream-Aquifer System Along the Arkansas River in Kearny and Finney Counties, Southwestern Kansas, U.S.G.S. Water-Supply Paper 2253 at 11 (1985) (2,900 wells; 320,000 acres irrigated in Phase II study area).

lands.[5] In neither of its motions, nor its briefs, nor its complaint, does Kansas even acknowledge the findings by the Colorado Water Judge in December 1976 that there was no competent evidence that stream flows had in fact suffered during the post-well period in Colorado or that reductions, if any, could be traced to well diversions rather than other causes.[6]

Unwittingly, Kansas supports the Colorado Water Judge's findings. In paragraph 7 of its motion, Kansas alleges that depletions have been caused by, among other things, the proliferation of unregulated alluvial wells along the Arkansas River, "essentially all of which are located above John Martin Dam and Reservoir." Motion at 2-3, ¶ 7. However, the mass diagram analysis by the Administration's investigation committee showed that the change in relationship between flows in various reaches of the Arkansas River in Colorado had occurred *below* John Martin Reservoir, which reinforces the findings by the Colorado Water Judge and supports the conclusion of the director of the Colorado Water Conservation Board that well development in Colorado does not appear to have been a likely cause of the decline in usable stateline flows beginning in 1974. *See* Colorado's Brief in Opposition to Motion for Leave to File Complaint at 12-13. Thus, the Colorado representatives have not thwarted a meaningful investigation of post-compact well development in Colorado by the Administration. Instead, Kansas only wants to recognize evidence that supports its own preconceived conclusion.[7]

[5]In re the Amendment of the Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights Located in the Arkansas River and Its Tributaries, Case Nos. W-4079, W-4080, W-4083, W-4084, and W-4085 at 10 (Dist. Ct., Water Division No. 2, Dec. 1, 1976), *aff'd sub. nom.* Kuiper v. Atchison, Topeka & Santa Fe Ry., 195 Colo. 557, 581 P.2d 293 (1978).

[6]*Id.* at 16.

b) Trinidad Reservoir.

With regard to the Trinidad Reservoir, the Colorado representatives have never refused to investigate the operation of that reservoir.

In its brief, Kansas states that the operation of Trinidad Reservoir "was initially investigated in 1981, and the ***Administration's recommendation*** that the Colorado State Engineer immediately release 18,290 acre-feet of water unlawfully stored was defeated by Colorado's negative vote on the Resolution of January 4, 1982." Kansas Reply Brief/Brief in Support at 15 (emphasis added). This is another example of the way in which Kansas has mischaracterized actions by the Administration.

First of all, the Colorado representatives agreed to an investigation of storage in Trinidad Reservoir under Article VIII.H. of the Compact at a special meeting of the Administration on June 30, 1980. Annual Report, Arkansas River Compact Administration, 47 (1980). At a special meeting on September 25, 1980, the Administration approved findings of fact concerning storage and transfer of water in Trinidad Reservoir during 1979 and 1980 based on the results of the investigation. *Id.* at 12-15. However, the Colorado representatives did not agree

[7]The assertion by Kansas that "well depletion has been discussed, both formally and informally, at numerous meetings of the Compact Administration," Kansas Reply Brief/Brief in Support at 10, is greatly exaggerated. No doubt there was discussion of the Colorado State Engineer's efforts to regulate well development in Colorado, but it was not until Attorney General Stephan's letter of February 26, 1985, that well development in Colorado was raised for the first time by Kansas. All prior correspondence and discussion with Attorney General Stephan or with the Kansas representatives had related to the operation of Trinidad Reservoir or Pueblo Reservoir.

that those facts established a violation of the Compact. *Id.* at 48. The Administration then recommended that the Kansas Chief Engineer confer with the Colorado State Engineer "to make further inquiries into this question as expeditiously as possible." *Id.* at 48. The two engineers met in Topeka, Kansas, on July 1, 1981. Annual Report, Arkansas River Compact Administration, 55 (1981). The Colorado State Engineer then furnished to the Kansas Chief Engineer information concerning storage records requested by the Kansas Chief Engineer on the understanding that if such information was supplied, the issue concerning the operation of Trinidad Reservoir would be dropped. *Id.* at 55-56. At a special meeting of the Administration on August 6, 1981, however, the Kansas Chief Engineer indicated that the issue was not resolved. Colorado believes it is important to set the record straight on this matter. Unfortunately, the only way to do so is to quote the entire discussion from the minutes of the Administration meeting:

> Mr. Gibson [the Kansas Chief Engineer] noted that he had, during the meeting [with the Colorado State Engineer], questioned: (1) whether or not the transfer among accounts in Trinidad Reservoir had affected the river in the same manner had Trinidad Reservoir not been there, and (2) the right to make such "paper" transfers. Mr. Gibson noted that Dr. Danielson [the Colorado State Engineer] had provided information to him on the 10 year running average at the Thatcher gage, which average had been exceeded by actual flows for the entire period of available record. Mr. Gibson stated, however, that the available record covered only 10 or 11 years.
>
> Mr. Gibson went on to note that he had requested additional information at the meeting, which information was subsequently provided by Dr. Danielson. Mr. Gibson then called upon his deputy, Mr. Jerry Hilmes, to report on his review of the data provided to Mr. Gibson by Dr. Danielson in a letter dated July 29, 1981

> (see Attachment B). Mr. Hilmes then reiterated the information contained in Dr. Danielson's letter of July 29.
>
> Mr. Bentrup [a Kansas representative] asked if the Colorado State Engineer had also provided a report. Mr. McDonald [the director of the Colorado Water Conservation Board] responded that Dr. Danielson's letter of July 29 constituted his report on this matter. Mr. Bentrup indicated that the Kansas ditches were anxious to have the Administration's deliberations concluded if no further steps under Article VIII, paragraph H of the compact were to be taken. Mr. Cooley [the U.S. representative] then reviewed the chronology of the Administration's actions and the exchange of information between Colorado and Kansas. He commented that it appeared to him that Dr. Danielson's July 29 letter disposed of the questions thus far raised by Kansas. Mr. Gibson responded that he did not believe that all relevant information had yet been addressed, citing examples of what he had in mind.
>
> Discussion ensued about the Administration's process concerning the Trinidad Reservoir matter. Mr. Bentrup reiterated his concern that the Administration not prolong the process or delay its dispositon of this matter. He noted that he had expected Dr. Danielson to report to the Administration at this meeting.
>
> Mr. McDonald reiterated his earlier observation that the July 29 letter from Dr. Danielson constituted his report. He further stated that Colorado had responded to every request for information made to date by Kansas. He also noted that the Administration, by resolution, had asked only that the Kansas chief engineer confer with the Colorado state engineer. The Administration had not formed a committee nor asked the state engineers to prepare a report. Mr. McDonald com-

mented that he considered the initiative to be with Kansas to decide whether they were or were not satisfied with the information thus far provided to them.

At this time the Kansas delegation asked for a brief recess, which was granted by the chairman. Upon returning from the recess, the Kansas delegation indicated that they had in preparation a motion concerning the Trinidad Reservoir matter which was not then ready. They asked to go on to the next item on the agenda.

* * *

Upon reconvening, Mr. Bentrup indicated that the Kansas delegation no longer wished to offer the proposed motion on Trinidad Reservoir which was discussed prior to lunch. Rather, Mr. Bentrup indicated that Kansas would be asking the Colorado State Engineer for additional information and data concerning the operation of Trinidad Reservoir within the next couple of weeks. It was agreed that this matter would be placed on the agenda for the December, 1981, annual meeting.

Id. at 49-50, 52.

At the next meeting of the Administration on January 4, 1982, without further investigation or discussion, Mr. Bentrup, one of the Kansas representatives, proposed a resolution that the State Engineer of Colorado immediately release all water in excess of the 6,200 acre-feet stored in Trinidad Reservoir. Annual Report, Arkansas River Compact Administration 38, 57 (1982). After the motion was seconded by another Kansas representative, the minutes of the meeting state as follows:

> Mr. McDonald [the director of the Colorado Water Conservation Board] noted that he respectfully disagreed with the resolution, that the Colorado State Engineer has and would continue to administer Trinidad Reservoir in conformance with the compact, and that Colorado had to reject the motion. The motion failed with Kansas voting yes and Colorado voting no.

Id. at 38. Thus, contrary to the statement by Kansas, there was no Administration "recommendation" that the Colorado State Engineer immediately release 18,290 acre-feet of water "unlawfully" stored in Trinidad Reservoir, but merely a resolution proposed by a Kansas representative which was voted against by the Colorado representatives. Thereafter, the Colorado Attorney General refused to join in a request by the Kansas Attorney General to arbitrate the dispute concerning Trinidad Reservoir unless and until Kansas first produced further factual information to support its contention that Trinidad Reservoir had been operated in violation of the Compact. Annual Report, Arkansas River Compact Administration, 88-89 (1983) (letter dated March 23, 1983, from Colorado Attorney General Duane Woodard to Attorney General Robert T. Stephan).

Thereafter, the Kansas Attorney General petitioned the Kansas legislature for funds and on September 23, 1983, contracted with a consulting engineering firm to analyze the operation of the Trinidad Project and other matters of concern to Kansas. Kansas Reply Brief/Brief in Support at 12. This report was completed in 1984 and a copy was transmitted to the Colorado Attorney General. However, the Kansas Attorney General's office informed Colorado that Kansas was in the process of compiling and documenting its concerns and would present a written document to Colorado officials outlining its concerns prior to the March 28, 1985 meeting of the Administration. Letter dated December 13, 1984, from John W. Campbell, Assistant Attorney General, to William H. Bassett, Assistant Attorney General. On March 28, 1985, the Kansas representatives requested the Administration to investigate the operation of the Trinidad Dam and Reservoir Project and the Colorado representatives agreed to the investigation.

The Kansas allegations concerning Trinidad Reservoir have not been the focus of the committee investigation for a simple reason. The Administration, at its annual meeting on December 11, 1984, requested the U.S. Bureau of Reclamation to initiate a review of the operating principles for the project in accordance with a condition to the operating principles which was proposed by the State of Kansas and approved by the U.S. Bureau of Reclamation and the Purgatoire River Water Conservancy District.[8] Minutes of Arkansas River Compact Administration Meeting held at Lamar, Colorado, at 10 (Dec. 11, 1984). As Kansas acknowledges in its reply brief, the U.S. Bureau of Reclamation issued a draft review of the operating principles on December 20, 1985, and requested comments on the draft review by February 15, 1986. That date was subsequently extended to March 3, 1986, at the request of the Kansas Chief Engineer. While Kansas is correct that the Bureau of Reclamation has no power to force the Colorado representatives to vote affirmatively, the essential point is that the review by the Bureau of Reclamation provides an adequate means to address its concerns about the operation of the project. *See United States v. Nevada,* 412 U.S. 534, 538 (1973); *Illinois v. Milwaukee,* 406 U.S. 91, 93-94 (1972).

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[8]The Trinidad Dam and Reservoir was authorized by Congress in the Flood Control Act of 1958. Act of July 3, 1958, 72 Stat. 305, 309, *as amended by* Act of October 27, 1965, 79 Stat. 1073, 1079. On February 10, 1967, the United States entered into a contract with the Purgatoire River Water Conservancy District ("PRWCD") which provided for construction, repayment, and operation of the project in accordance with, among other things, operating principles and the laws of the State of Colorado. Prior to signing the contract, the PRWCD adopted a resolution approving five conditions to the operating principles proposed by the State of Kansas, one of which provided for a review of the operating principles five years after beginning operation of the reservoir for irrigation "to determine the effect, if any, the operation has had on other Colorado and Kansas water users and the principles amended as necessary."

c) Pueblo Reservoir.

With regard to the Pueblo Reservoir, the Colorado representatives have never refused to investigate the operation of the reservoir. However, the only question that Kansas suggests should be investigated is whether Colorado complied with a July 24, 1951 resolution of the Administration expressing as a policy of the Administration that there be no reregulation of native waters of the Arkansas River, as proposed in a report on the Gunnison-Arkansas Project, until a plan of operation had been submitted to and approved by the Administration. As explained in Colorado's Brief in Opposition to Motion for Leave to File Complaint, the Colorado representatives have not agreed that the resolution is applicable to the Fryingpan-Arkansas Project, of which Pueblo Reservoir is a component; but, in any event, Kansas does not deny that the Administration failed to raise an objection to the winter storage program in Pueblo Reservoir for six years after it began operation in 1975, or that the winter storage program was operated since 1975 with the full knowledge of the Administration, or that the U.S. Geological Survey performed a review of the potential reduction of inflow to John Martin Reservoir from winter storage in Pueblo Reservoir in 1975 and again in 1981 and presented its findings to the Administration at a special meeting on August 6, 1981. Under the circumstances, Colorado fails to see how the Kansas complaint raises a substantial question justifying an original action in this Court or any other relief.

d) Transmountain Return Flows.

With regard to "transmountain"[9] return flows, Kansas asserts that they need to be investigated for two reasons. First, Kansas asserts that "transmountain" water imported into the Arkansas River Basin has been deducted from the upstream

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[9]The term "transmountain" water in this instance refers to water imported into the Arkansas River Basin from the Colorado River Basin.

gages, while the return flows have not. Kansas Reply Brief/ Brief in Support at 16. This is correct, but this has always been the case. Water imported into the Arkansas River Basin is not apportioned to Kansas under the Arkansas River Compact. *See* Art. III.B., IV.A. To the extent "transmountain" water can be distinguished from "native" waters of the Arkansas River, it is deducted from the flow at upstream gages. Once "transmountain" water is applied to use for irrigation, it is not possible in most cases to distinguish "transmountain" return flows from "native" waters of the Arkansas River. "Transmountain" return flows, whatever the amount, that reach and are stored in John Martin Reservoir are not separately accounted for. Indeed, Colorado believes that it would be difficult, if not impossible, to do so because of the number of intervening ditches which divert water above John Martin Reservoir in Colorado. To the extent "transmountain" return flows reach, and are stored in John Martin Reservoir, Kansas receives the benefit of the additional supply, if any. Kansas has no right to "transmountain" water under the Compact and has no right to complain about proposals by the City of Colorado Springs to reuse or successively use "transmountain" water, which it has the right to do under Colorado law. Colo.Rev. Stat. §37-82-106 (1985 Cum. Supp.). Any possible injury to Kansas from the reuse of "transmountain" water is purely hypothetical at this point.

B. None Of The Factors Necessary For A Preliminary Injunction Against Post-Compact Well Uses Are Present In This Case.

In addition to its request for an order compelling Colorado to investigate, Kansas asks the Court for an order to enjoin all post-compact well uses in the Arkansas River Valley pending completion of the Administration's investigation within a time

certain. Motion at 8.[10] There is simply no basis for such extraordinary relief. An application for a preliminary injunction is addressed to the sound discretion of the Court. "Factors traditionally examined include: (1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) whether the public interest would be better served by issuing than by denying the injunction; and (4) the comparable hardship inflicted upon the parties." *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 74 (1st Cir. 1981); 11 C.Wright & A.Miller, Federal Practice and Procedure §2948 at 430-31 (1973).

An examination of these factors does not support the request for a preliminary injunction. First, there is no threat of immediate irreparable harm because John Martin Reservoir is nearly full at the present time and, in any event, Kansas water users have an alternate source of supply available from wells. *See* Kansas Reply Brief/Brief in Support at 19.[11] Second, the findings by the Colorado Water Court and the results of the investigation by the committee to date demonstrate there is no substantial likelihood of success on the claim that well development in Colorado has materially depleted the flows of the Arkansas River in violation of the Compact; the Kansas allegation raises complex issues of fact whose resolution is not free from doubt. This is compounded by the lack of any immediate irreparable harm. Third, the public interest would not be served by enjoining post-compact well uses in Colorado when it is apparent that well development in Kansas occurred to a far greater extent and continued long after such development was curtailed in Colo-

[10]Presumably, Kansas only intended to ask for an order to enjoin post-compact well uses in Colorado, but its motion is not so limited.

[11]The statement that these wells "tap the nonrenewable ground water resources of the Ogallala aquifer," Kansas Reply Brief/Brief in Support at 19, is not supported by the U.S.G.S. study. *See* L. Dunlap, R. Lindgren & C. Sauer, *supra* note 4, U.S.G.S. Water-Supply Paper 2253.

rado, and particularly when Colorado water officials have made substantial efforts to regulate post-compact well development since 1965. Fourth, the hardship inflicted on Colorado well owners would be far greater than any potential benefit to Kansas in view of the fact that John Martin Reservoir is nearly full and the Kansas water users have an alternate source of supply available from wells.[12] Thus, there is no basis for a preliminary injunction.

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[12]Furthermore, some post-compact wells in Colorado are operated as alternate points of diversion for pre-compact surface water rights or are operated pursuant to court decreed plans for augmentation pursuant to which depletions are replaced from other sources. *See, e.g.,* Kelly Ranch v. Southeastern Colorado Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297 (1976). And all post-compact wells are subject to the State Engineer's rules and regulations governing ground water use which have been in effect since 1972.

CONCLUSION

While it is apparent that there are matters in dispute between Kansas and Colorado,[13] these disputes involve matters which require a high degree of expert and technical knowledge and which may be resolved or narrowed by the Administration or do not otherwise justify the exercise of original jurisdiction or the extraordinary relief sought by Kansas. The following facts, however, are not in dispute:

1. On March 28, 1985, the Administration, at the request of Kansas and Colorado, adopted a resolution to investigate a number of allegations of violations of the Compact, including well development in both states.

2. The resolution established a committee consisting of the director of the Colorado Water Conservation Board or his designee and the Chief Engineer of Kansas or his designee to conduct the investigation.

3. Beginning in April, 1985, the committee devoted substantial efforts to establishing a data base and preparing a mass diagram analysis to determine if there had been any changes in the relationship between streamflows at selected locations in the Arkansas River Basin.

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[13]This is only emphasized by the accusation in the Kansas brief that Colorado "has not recited the essential facts, has dissembled those it did recite, and would mislead the Court into a decision to decline jurisdiction." Reply Brief/Brief in Support at 2. The essential point, which Kansas misses, is that the findings by the Colorado Water Court demonstrate that there is a substantial, good-faith dispute as to whether well development in Colorado has materially depleted the flows of the Arkansas River in violation of the Compact. *See* Colorado's Brief in Opposition to Motion for Leave to File Compact at 15-17.

4. On July 12, 1985, at the request of the Kansas representatives, the Administration agreed to amend the March 28, 1985 resolution to include an investigation of whether Colorado had complied with the provisions of Article V.F. of the Compact concerning the administration of decreed rights in Colorado on the basis of relative priorites.

5. On October 8, 1985, after extensive reports were submitted by both committee members on the status of the investigation and areas for further investigation, the Administration expressly authorized the committee to "continue with its investigation on the matters upon which the Committee has mutually agreed that further investigation should be undertaken."

6. John Martin Reservoir is nearly full at the present time and there is little likelihood of injury to Kansas if the Administration proceeds with its investigation.

Based on the foregoing facts which are not in dispute, the Kansas motion for leave to file a complaint or, in the alternative, to compel compliance with Article VIII.H. of the Arkansas River Compact should be denied.

Respectfully submitted,

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